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The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians

Sarah J. Heim[†]

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Introduction

Defendants have raised duress as a defense to charges of war crimes and crimes against humanity since the Allies held the first large-scale war crimes trials at Nuremberg in the wake of the Second World War.¹ Although the International Military Tribunal (IMT) generally rejected the defendants' attempts to use duress as a defense, it never went so far as to rule out the defense.² More recently, the Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that duress can never serve as a full defense for a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent people.³ However, since the ICTY limited its analysis to whether *soldiers* can assert a defense of duress, an international criminal court has yet to address the question of whether *civilians* can assert a complete defense of duress where they have been accused of war crimes or crimes against humanity for the killing of an innocent person.⁴

Dražen Erdemović was tried before the ICTY after he admitted to participating in the mass execution of over 1,200 Muslim men and boys near Srebrenica.⁵ Although he pled guilty, Erdemović claimed he only participated in the killings because his superior threatened him with "instant death" if he did not comply with the order.⁶ The trial court accepted Erdemović's guilty plea and refused to allow him to assert an affirmative defense of duress.⁷

On appeal, the plurality denied a defense of duress for soldiers accused of committing war crimes or crimes against humanity where the crime involved the killing of innocent people.⁸ In establishing a prohibition against the use of the defense of duress, the plurality stressed the importance of policy considerations. These considerations included the concern that international law should serve as a guide for the conduct of combatants and their commanders.⁹ The plurality also emphasized the

1. See generally *United States v. Ohlendorf*, Case No. 9, Opinion and Judgment, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 411, 470-88 (1948) (reviewing foreign military penal codes and international law in dismissing defendants' claims of duress as a defense).

2. *Id.*

3. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

4. *Id.* ¶ 41.

5. *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 77 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>.

6. *Id.* ¶ 80.

7. *Id.* ¶¶ 19-20.

8. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 84.

9. *Id.* ¶ 80.

need to hold soldiers to a higher level of accountability than civilians because individuals with military training are expected to “exercise fortitude and a greater degree of resistance to a threat than civilians.”¹⁰

In his dissent, Justice Cassese rejected the plurality’s adoption of the common law rule on duress and argued that international courts should allow defendants to raise duress as a defense to the killing of innocent people under very limited circumstances.¹¹ Cassese argued in favor of allowing the defense by emphasizing that the defendant must show that the harm caused by submitting to the coercive order was not greater than the harm that would have been caused if the defendant had refused to follow the order.¹²

This Note argues that international criminal courts should allow civilians to raise a defense of duress against charges of war crimes or crimes against humanity. Civilian defendants will likely find it easier to meet the conditions laid out by the dissent in the *Erdemović* decision; civilians who commit war crimes often lack an adequate means of escape and are placed in their situations involuntarily by other actors. Unlike in cases involving members of the military, society does not assign a higher duty to civilians for the protection of innocent lives.¹³ Given the distinctions between the circumstances surrounding civilians as compared to soldiers, an international court should allow the defense of duress for civilian defendants charged with war crimes or crimes against humanity.

The first part of the Note examines the general jurisprudence of the defense of duress, including differences among common and civil law countries and current customary international law. The second part focuses on the ICTY Appellate Chamber’s opinion in the *Erdemović* case, which set the current precedent for the applicability of the duress defense in war crimes trials of soldiers. The third part proposes a new international standard for the defense of duress when raised by civilians who have killed an innocent person and are accused of war crimes or crimes against humanity. The fourth part applies these standards to historical situations in which civilians could have raised duress as a defense. In particular, this Note examines war crimes trials against former concentration camp capos after the Second World War and trials against Hutu civilians who participated in the killing squads in Rwanda.

I. The Defense of Duress

Under international criminal law, a defendant can raise an affirmative defense of duress when “the person, faced with an imminent danger to life,

10. *Id.* ¶ 84.

11. See Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

12. *Id.* ¶ 42.

13. See Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT’L L. 741, 764–67 (2008) (discussing voluntary and involuntary obligations of self-sacrifice).

limb, or freedom that cannot otherwise be averted, commits an unlawful act to avert the danger away from himself or herself, a relative, or a person close to himself or herself.”¹⁴ To constitute duress (as opposed to necessity), the threat must “emanate[] from a human being.”¹⁵ The threat must be imminent such that “the fear caused by the threat must be operating on the mind of the actor at the time of the criminal act.”¹⁶ The law also requires that the person under duress have no way to avoid the impending harm.¹⁷ Thus, “successful duress claims typically involve threatened injuries that will follow nearly instantly if the coerced actor fails to obey.”¹⁸ Most courts also require that the coerced actor is not responsible for the circumstances of his duress.¹⁹ For example, under international law a tribunal will examine “the issue of voluntary participation in an enterprise that leaves no doubt as to its end results” to ascertain the criminal culpability of the accused.²⁰

In addition to the general requirements to establish a duress defense, the law may impose additional requirements on actors who have a pre-existing duty of care. Criminal law generally sets expectations for the “reasonable man,” rather than for the “reasonable hero.”²¹ Therefore, the law does not demand that ordinary people engage in acts of heroism or self-sacrifice.²² However, if a coerced person has voluntarily assumed a special duty vis-à-vis others, the law may require a greater level of resistance from that person.²³

Legal scholars debate whether duress should be categorized as a justification or an excuse defense. While justification defenses acquit persons whose actions were justifiable, excuse defenses render persons “personally blameless . . . for their unjustifiable conduct.”²⁴ Many common law legal scholars view duress as a justification defense.²⁵ Traditionally, defendants may raise a justification defense when “the harm of violating the law is outweighed by a greater good.”²⁶ Under this theory, courts should recognize duress as an exculpatory defense if and only if the “commission of the

14. 1 MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE: MODEL CRIMINAL CODE art. 25, § 2 (Vivienne O'Connor & Colette Rausch eds., 2007).

15. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1339 (1989).

16. *Id.* at 1340.

17. *Id.*

18. *Id.*

19. *Id.* at 1341.

20. GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 58 (2d ed. 2008).

21. Chiesa, *supra* note 13, at 757.

22. *Id.*

23. See *id.* at 764–65; see also Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 80 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

24. Dressler, *supra* note 15, at 1349.

25. See Chiesa, *supra* note 13, at 748.

26. See Douglas Husak, *The 'But Everybody Does That!' Defense*, in THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 338, 353 (2010).

crime is a lesser evil or social harm than that threatened.”²⁷ The defendant would argue that although he knowingly violated the law, his illegal act was not actually wrongful. Therefore, to analyze a defendant’s coerced actions, juries would be required to engage in balancing tests weighing the gravity of the threatened harm against the harm that the coerced defendant’s actions caused.

In contrast to justification defenses, defendants can raise an excuse defense “to allege that [he] is not to blame for what he has done, even though what he has done may have been wrongful.”²⁸ Thus the actor recognizes that his actions were both unlawful and wrong; he argues, however, that he should be excused for his actions since he committed them under duress.

Various policy arguments support the excuse theory of duress. The Human Frailty Theory posits that society should not punish an actor for committing a wrongful act if most members of society would have acted in a similar manner.²⁹ This theory is based on the rationale that “the coerced wrongdoer behaved in a statistically normal manner in particularly compelling circumstances.”³⁰ The second theory supporting the duress defense is the Involuntariness Theory, which states that although a person acting under duress had the capacity to make the right (moral) choice, he “lacked a fair opportunity to avoid acting unlawfully.”³¹ The Involuntariness Theory asserts that “the actor’s choice to protect her interests at the expense of others is in reality ‘no choice at all’ and that duress exculpates the actor because her capacity to choose to do otherwise is ‘absent’ in light of the coercion.”³² The coercion exerted upon the actor effectively “overb[ears]” the actor’s ability to make a true choice under the circumstances.³³

States differ in whether they recognize duress as a complete defense to the murder of an innocent person. Generally, common law states impose a strict prohibition against duress for murder, whereas civil law countries allow the defense under certain circumstances.³⁴ The penal codes of most civil law states allow duress as a complete defense to all offenses, including murder, provided the defendant was not responsible for placing himself in the situation causing the duress.³⁵ In contrast, the common law prohibits

27. Dressler, *supra* note 15, at 1351.

28. Husak, *supra* note 26, at 354.

29. See, e.g., Dressler, *supra* note 15, at 1363 (referring to an “‘I Am Only Human’ claim”).

30. *Id.*

31. *Id.* at 1365.

32. Chiesa, *supra* note 13, at 758.

33. *Id.* at 759 (alteration in original) (internal quotation marks omitted).

34. See generally Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 59 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf> (providing an overview of the duress defense in various civil law and common law countries).

35. *Id.*

the use of duress as a defense to murder on policy grounds.³⁶ In the British case *R. v. Howe*, Lord Mackay wrote:

It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that the law should recognise in any individual in any circumstances, however, extreme, the right to choose that one innocent person should be killed rather than another.³⁷

The common law's absolute prohibition on the use of duress to defend a homicide charge is "likely based on the deontological claim that it is morally wrong to kill innocent persons, even if the coerced homicidal act might" be excused by other factors.³⁸

II. The Development of the Duress Defense Under International Criminal Law

A. Post-World War Two Trials: Duress vs. Superior Orders

The IMT outlined its requirements for duress as an affirmative defense to war crimes and crimes against humanity in *United States v. Ohlendorf* (the *Einsatzgruppen* Case). In compliance with Article 8 of the Charter of the International Military Tribunal, the IMT rejected the defense of superior orders when the orders were manifestly illegal.³⁹ However, the court stated that a defendant could raise the defense of duress if he was coerced to carry out an unlawful order.⁴⁰ In order to raise a successful duress claim, the IMT required a defendant to satisfy the traditional criteria for duress: the existence of an imminent, real, and inevitable threat.⁴¹ The defendant must also prove that he performed the coerced act against his will.⁴² If the defendant in fact "approved of the principle involved in the order," the defense of duress failed.⁴³ Additionally, a defendant could only retain the right to assert a defense of duress if his objection to the illegal activity was "constant," and he never acquiesced to the "illegal character" of the order.⁴⁴

The IMT additionally applied a "no fault" requirement to defendants claiming duress: if the defendant should have anticipated the order to commit the illegal act, based on his knowledge of the mission and prior acts of the organization to which he had voluntarily become a member, he should

36. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 487 (2d ed. 1999).

37. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 71.

38. Dressler, *supra* note 15, at 1352.

39. *United States v. Ohlendorf*, *supra* note 1, at 471.

40. *Id.* at 480-82.

41. *Id.* at 480.

42. *Id.*

43. *Id.*

44. *Id.* at 481.

not be excused for his crime.⁴⁵ The IMT stated: "One who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to."⁴⁶ Therefore, to apply this "no fault" requirement courts had to assess whether a reasonable person in the defendant's position would have anticipated the illegal order.⁴⁷

The IMT also required the defendant to show that "the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order."⁴⁸ In a situation where the defendant lacked the opportunity to prevent a greater or equal harm from occurring compared to the harm threatened against him, the IMT concluded that the defendant lacked any "moral choice" in the outcome and therefore should be able to assert a defense of duress.⁴⁹ Highlighting this approach, the IMT declared: "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. . . . No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."⁵⁰ By imposing a balancing test in which the harm caused must be "disproportionately greater" than the harm threatened, the court left the interpretation and application of this standard open for future tribunals.

B. International Criminal Tribunal for the Former Yugoslavia:

Prosecutor v. Erdemović

1. Background

The next major international judicial decision on the applicability of the defense of duress to charges of war crimes and crimes against humanity came in the wake of the ethnic cleansings that occurred during the Bosnian War.⁵¹ The defendant, Dražen Erdemović, was born in 1971 in Bosnia and Herzegovina in the former Socialist Federal Republic of Yugo-

45. *Id.* at 480-81.

46. *Id.* at 481.

47. For a discussion on what the law should require of the concept of "the reasonable person" in duress cases, see Rosa Ehrenreich Brooks' essay *Law in the Heart of Darkness: Atrocity and Duress*, arguing that courts should use a "stronger conception" of the reasonable person standard requiring that "a person must be reasonable *not* in the sense of being ordinary, but in the sense of thinking through his actions and their consequences in a thoughtful, reasoned way, and behaving in ways that are sensible, careful, and prudent." Rosa Ehrenreich Brooks, Essay, *Law in the Heart of Darkness: Atrocity and Duress*, 43 VA. J. INT'L L. 861, 872 (2003).

48. *United States v. Ohlendorf*, *supra* note 1, at 471.

49. *Id.*; see also Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 19-23 (1997) (describing the "voluntariness test" created at Nuremberg: "An individual carrying out a clearly criminal command under international law is culpable absent evidence that he lacked moral choice - that his action was the product of duress or coercion. This equivocal standard was subsequently endorsed by the United Nations and cited in subsequent prosecutions of Nazi war criminals.").

50. *United States v. Ohlendorf*, *supra* note 1, at 480.

51. KNOOPS, *supra* note 20, at 57.

slavia.⁵² He was a Bosnian citizen and self-identified as a Croat.⁵³ In 1990, he began serving in the Yugoslav People's Army (JNA), which included soldiers of Slovenian, Serbian, Hungarian, and Albanian origins.⁵⁴ In May or July of 1992, Erdemović was summoned to join the army of Bosnia and Herzegovina, but he did not want to participate in the Bosnian War and subsequently left the army in November 1992.⁵⁵ He then joined the military police of the Croatian Defense Council (HVO), where he served until November 1993.⁵⁶ While serving in the HVO, Erdemović was "beaten . . . for having helped Serbian women and children to return to their territory."⁵⁷

Due to financial and personal security concerns, Erdemović enlisted in the Army of Republika Srpska (the Bosnian Serb Army) in April 1994.⁵⁸ During a hearing before his trial, he claimed that his "decision to serve in that army was based on his need for money to feed himself and his wife, his desire to obtain identity papers in order to travel freely and the assurance of some status as a Croat in Republika Srpska."⁵⁹ At the same hearing, he asserted that he had joined the 10th Sabotage Unit of the Army of Republika Srpska because, compared to other divisions, it had an ethnically diverse group of soldiers.⁶⁰

On July 16, 1995, a unit commander ordered Erdemović and seven other members of his unit to "prepare . . . for a mission."⁶¹ Erdemović claimed that they had no knowledge of the purpose of the mission.⁶² When the men arrived at the Branjevo collective farm near Pilica, they were told that they were going to aid in the killing of hundreds of Muslim men.⁶³ "The [Muslim] men were unarmed civilians who had surrendered to the . . . Bosnian Serb army . . . after the fall of the United Nations 'safe area' at Srebrenica."⁶⁴ Erdemović claimed that although he instantly refused to take part in the massacre, he was told: "If you don't wish to do it, stand in line with the rest of them and give others your rifle so that they can shoot you."⁶⁵ Erdemović stated that had he not carried out the order, he believed that he and his family would have been killed.⁶⁶ He also claimed that he witnessed the commander ordering someone else to be killed for refusing

52. Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>.

53. *Id.*

54. *Id.* ¶ 105. Note that JNA is the Serbo-Croatian acronym for the Yugoslav People's Army.

55. *Id.* ¶ 79.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (internal quotation marks omitted).

60. *Id.*

61. *Id.* ¶ 80.

62. *Id.*

63. *Id.* ¶¶ 2, 80.

64. *Id.* ¶ 2.

65. *Id.* ¶ 80 (internal quotation marks omitted).

66. *Id.*

to obey orders.⁶⁷ Despite the threat, Erdemović attempted to save a man who claimed to have saved Serbs from Srebrenica.⁶⁸ However, his commanding officer ordered the man to be executed to ensure that there were no witnesses.⁶⁹ By the end of the day, Erdemović and his comrades had executed approximately 1,200 Muslim men.⁷⁰ The prosecutor estimated that Erdemović himself was personally responsible for the deaths of between ten and one hundred individuals.⁷¹

A lieutenant colonel then ordered the unit to execute an additional five hundred Muslim men who were being held in a public building in Pilica.⁷² Erdemović and three of his comrades refused to obey the order, and all four men were excused from participating in the executions.⁷³ Several days later, a fellow soldier attempted to kill Erdemović and two of his friends, allegedly because they had refused to participate in the second round of killings.⁷⁴ Erdemović was seriously wounded and subsequently treated in hospitals in Bijeljina and Belgrade.⁷⁵

After his release from the hospital, Erdemović contacted a journalist to whom he then confided his story.⁷⁶ Serbian officers arrested him two days after the interview, and he arrived at The Hague on March 30, 1996.⁷⁷ Following his arrest, Erdemović vigorously communicated his remorse for his crimes and expressed his “loathing of [the] war and nationalism”⁷⁸

2. *The Appellate Chamber’s Opinions*

The lower court accepted Erdemović’s guilty pleas for the charges against him. On appeal from this decision, the judges of the appellate chamber split three to two on the issue of whether duress could provide a complete defense to a soldier who participated in the killing of innocent civilians.⁷⁹ Judges McDonald and Vohrah wrote a joint opinion on behalf of the court finding the duress defense unavailable to soldiers under these circumstances.⁸⁰ Judge Li wrote a separate and dissenting opinion, in which he affirmed the plurality’s general holding, but rejected their decision to remand the case to the trial chamber so that Erdemović could re-

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* ¶ 77.

71. *Id.* ¶ 85.

72. *Id.* ¶ 81.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 41 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf> (confining its inquiry explicitly “to whether duress is a complete defence for a soldier who has been charged under international law with killing innocent persons” (emphasis added)).

80. See generally *id.*

plead in light of the disallowance of the defense of duress.⁸¹ Judges Casse and Stephen each submitted a separate and dissenting opinion, both finding that a defendant can assert duress as a complete defense to the charge of killing innocent civilians so long as the harm caused was not disproportionate to the harm threatened.⁸²

In establishing an absolute prohibition on soldiers' invocation of duress as an affirmative defense to the murder of innocents, the plurality focused primarily on policy arguments.⁸³ After examining the outer limits of the duress defense in the domestic codes of various civil and common law countries, as well as the decisions of post-World War Two military tribunals, the plurality concluded that there existed no international norm recognizing duress as a defense for crimes involving the murder of innocent civilians.⁸⁴ The plurality rejected the IMT's decision in the *Einsatzgruppen* case as lacking sufficient support⁸⁵ and instead focused on the policy considerations underlying the common law "normative mandate" against the use of duress to excuse murder charges. Quoting Professor Hersch Lauterpacht's criticism of the *Einsatzgruppen* decision, the plurality asserted that:

[n]o principle of justice and, in most civilised communities, no principle of law permits the individual person to avoid suffering or even to save his life at the expense of the life—or, as revealed in many war crimes trials, of a vast multitude of lives—[or of] sufferings, on a vast scale, of others.⁸⁶

The plurality further expounded that "the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role."⁸⁷

The plurality emphasized the tribunal's role as an international court that the Security Council established to "halt and effectively redress" the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace."⁸⁸ As such, the tribunal was compelled to craft its decisions to "have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the com-

81. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojli971007e.pdf>.

82. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>; *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojste971007e.pdf>.

83. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 73-80.

84. *Id.* ¶ 49.

85. *Id.* ¶ 44.

86. *Id.* ¶¶ 43, 73.

87. *Id.* ¶ 75.

88. *Id.*

manders who control them in armed conflict situations.”⁸⁹ If the goal of international humanitarian law is to protect “the weak and vulnerable,”⁹⁰ the plurality argued, then the tribunal should not allow defendants to escape responsibility for their crimes by entering a plea of duress.⁹¹ Additionally, the plurality expressed its expectation that soldiers or combatants should “exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened.”⁹² Judges McDonald and Vohrah therefore rejected the defense of duress for soldiers based on the argument that international law holds soldiers to a higher duty than that to which it holds ordinary civilians.

The plurality rejected the dissenting judges’ argument that the court should implement, as one criterion for a successful duress defense, a proportionality test to determine whether the defendant’s actions actually caused more harm than if the defendant had sacrificed himself.⁹³ Since the killings would have occurred regardless of whether Erdemović agreed to participate, the dissent argued that duress should be an available defense because no action he could have taken would have prevented the resulting crime.⁹⁴ The plurality rejected this balancing of harms test, quoting the prosecutor’s argument that a weighing of harms would lead to “all sorts of highly problematical philosophical discussions.”⁹⁵ In emphasizing its choice to establish a moral absolute, the plurality wrote: “The approach we take does not involve a balancing of harms for and against killing but rests upon an application in the context of international humanitarian law of the rule that duress does not justify or excuse the killing of an innocent person.”⁹⁶

Judge Cassese wrote a separate and dissenting opinion, in which he criticized the plurality for “incorporat[ing] into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems”⁹⁷ Specifically, he objected to the plurality’s adoption of the traditional common law duress jurisprudence. In Judge Cassese’s view, the tribunal was only authorized to enforce international law, and therefore should have “refrain[ed] from engaging in meta-legal analyses” and should not have “rel[ie]d] exclusively on notions, policy considerations or the philosophical

89. *Id.*

90. *Id.*

91. *Id.* ¶ 80.

92. *Id.* ¶ 84.

93. *See id.* ¶ 80.

94. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 42 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

95. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 81 (quoting Prosecutor v. Erdemovic, Case No. IT-96-22-A, Appeals Transcript, 84-85, (Int’l Crim. Trib. for the Former Yugoslavia May 26, 1997), <http://www.icty.org/x/cases/erdemovic/trans/en/970526IT.htm>).

96. *Id.* ¶ 80.

97. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 4.

underpinnings of common-law countries, while disregarding those of civil-law countries or other systems of law.”⁹⁸

In the absence of a standing rule of customary international law regarding whether a defendant may plead duress against charges of war crimes or crimes against humanity where the underlying offense is murder, Judge Cassese believed the tribunal should have applied “the general rule on duress.”⁹⁹ The preference for this general rule stemmed from prior opinions of international tribunals, including the IMT’s *Einsatzgruppen* decision and the Israeli Supreme Court’s decision in the *Eichmann* trial.¹⁰⁰

Judge Cassese set out the following criteria for a successful defense of duress for war crimes or crimes against humanity where the defendant killed an innocent person:

- (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
- (ii) there was no adequate means of averting such evil;
- (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;
- (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.

In addition, . . . the existence in law of any special duty on the part of the accused towards the victim may preclude the possibility of raising duress as a defence.¹⁰¹

According to Judge Cassese, the most challenging requirement—proportionality—would only succeed if the defendant could show that “it [was] not a case of a direct choice between the life of the person acting under duress and the life of the victim”¹⁰² Consequently, Judge Cassese emphasized the high hurdle that the proportionality requirement would require defendants to clear:

The third criterion—proportionality . . .—will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps . . . it will *never* be satisfied where the accused is saving his own life at the expense of his victim, since there are enormous, perhaps insurmountable

98. *Id.* ¶ 11(ii).

99. *Id.* ¶ 12.

100. See *id.* ¶ 33. Adolf Eichmann coordinated the deportation of Jews from western, southern, and northern Europe to the extermination camps in Eastern Europe. After the war, he fled to Argentina, where Israeli Security Service agents found him and arranged for his extradition to Israel in 1960. Eichmann was charged with crimes against the Jewish people and crimes against humanity. An Israeli court found him guilty on multiple counts and sentenced him to death. See Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 DUKE L.J. 400, 400 (1961); *Eichmann Trial*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005179> (last updated May 11, 2012).

101. *Prosecutor v. Erdemovic*, Case No. IT-96-22A, Separate and Dissenting Opinion of Judge Cassese, ¶ 16.

102. *Id.* ¶ 42 (emphasis omitted).

ble, philosophical, moral and legal difficulties in putting one life in the balance against that of others¹⁰³

Therefore, if Erdemović could prove that the murder of thousands of Muslim men and boys would have occurred regardless of his participation, he should have been able to raise a successful defense of duress against the charges.¹⁰⁴

C. The Rome Statute

The next institution to set a significant standard regarding the use of the defense of duress for the killing of innocent persons was the International Criminal Court (ICC). The international community spent seventy-five years debating the terms of the Rome Statute, which laid the foundation for the ICC.¹⁰⁵ The Rome Statute was finally adopted on July 17, 1998 and went into force on July 1, 2002.¹⁰⁶ Article 31 lays out the confines of the defense of duress for war crimes and crimes against humanity in the following terms:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

. . . .

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

103. *Id.*

104. See *id.* ¶ 44 ("Thus the case-law seems to make an exception for those instances where - on the facts - it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the crime would in any event have been carried out by persons other than the accused. The commonest example of such a case is where an execution squad has been assembled to kill the victims, and the accused participates, in some form, in the execution squad, either as an active member or as an organiser, albeit only under the threat of death. In this case, if an individual member of the execution squad first *refuses to obey* but has then to comply with the order as a result of duress, he may be excused: indeed, whether or not he is killed or instead takes part in the execution, the civilians, prisoners of war, etc., *would be shot anyway*. Were he to comply with his legal duty not to shoot innocent persons, he would forfeit his life *for no benefit to anyone and no effect whatsoever* apart from setting a heroic example for mankind (which the law cannot demand him to set): his sacrifice of his own life would be to no avail. In this case the evil threatened (the menace to his life and his subsequent death) would be greater than the remedy (his refraining from committing the crime, i.e., from participating in the execution).").

105. See M. Cherif Bassiouni, *Preface to the First Edition*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT xxix, xxix (Otto Triffterer ed., 2d ed. 2008) [hereinafter COMMENTARY ON THE ROME STATUTE].

106. Philippe Kirsch, *Introduction to the Second Edition*, in COMMENTARY ON THE ROME STATUTE, *supra* note 105, at xxxiii.

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.¹⁰⁷

Commentators criticized the drafters of the Rome Statute for combining the concepts of necessity and duress, thereby creating a hybrid defense that serves as both a justification and an excuse.¹⁰⁸ For example, Albin Eser argues "paragraph 1(d) blends the justifying *choice of a lesser evil* (necessity) with excusing situations where the defendant's freedom of will and decision is so severely limited that there is eventually *no moral choice* available (duress)."¹⁰⁹ Despite this criticism, the proportionality requirement closely mirrors the precedents set by the IMT and Judge Cassese's dissent in *Erdemović*.¹¹⁰

III. Applying Current International Law Standards to Pleas of Duress by Civilian Perpetrators

A. Applicable Law

Based on the precedent set by the IMT, the conflicting opinions in the *Erdemović* appeal, and the recent adoption of the Rome Statute's requirements for duress, an international tribunal should allow a civilian, who did not hold a leadership position within the civil government, to raise an affirmative defense of duress. Since the plurality in *Erdemović* limited itself to deciding whether a *soldier* could raise a defense of duress against charges of war crimes or crimes against humanity when he has killed an innocent person, it never expressly precluded the possibility of a civilian claiming duress for a similar crime.¹¹¹

Both the plurality and the dissent in *Erdemović* stressed the importance of requiring soldiers and certain government officials to exercise a

107. Rome Statute of the International Criminal Court art. 31, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

108. See, e.g., Albin Eser, *Article 31: Grounds for Excluding Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE, *supra* note 105, at 883 ("Among the many compromises which had to be made in order to get this Statute accepted, paragraph 1(d) is one of the least convincing provisions, as in an ill-guided and lastly failed attempt, it tried to combine two different concepts: (justifying) 'necessity' and (merely excusing) 'duress.'" (footnote omitted)); Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 27-28 (1999) ("The drafting, however, mixes up different concepts relating to duress on the one hand, and necessity on the other. . . . Subparagraph (d) uses objective elements of both concepts. The 'threat' refers to necessity and duress, while the 'necessary and reasonable reaction' refers only to necessity, introducing a new subjective requirement which relates to the choice of evils criterion. Further, the distinction between a threat made by persons and a threat constituted by other circumstances beyond the person's control refers to duress (the former) and necessity (the latter). In sum, the drafting confirms the conceptual vagueness surrounding international criminal law defences." (footnotes omitted)).

109. Eser, *supra* note 108, at 884 (footnotes omitted).

110. See *infra* Parts II.A, II.B.2.

111. See *infra* Part II.B.2.

higher level of resistance to coercion.¹¹² The presence of a higher duty of care toward other members of society was likely a determinative factor in the plurality's decision.¹¹³ However, this concern should not factor into an analysis of whether to allow civilians to assert a defense of duress because civilians are generally not held to any particular duty of care in relation to others.¹¹⁴

Likewise, the plurality's emphasis on creating international law that should "guide the conduct of combatants and their commanders" would not be as great of a concern in a case dealing with crimes committed by civilians.¹¹⁵ Granted, military commanders could order civilians to commit crimes in order to avoid subjecting their own soldiers to criminal liability. However, in these instances the commanders, rather than the civilians, should be held accountable for these crimes because the civilians were acting under duress and were carrying out the will of the coercing party.

Given that all three of the previously discussed standards for duress—those set by the IMT, Judge Cassese, and the Rome Statute—require that the person acting under duress did not cause a disproportionate amount of harm compared to the harm threatened against him, it is likely that an international court would impose the same requirement for a civilian's duress claim. Although many scholars have criticized this proportionality test for combining the excuse and justification rationales for the defense of duress,¹¹⁶ there is no evidence that international courts will soon abandon this well-established standard. Therefore, for the purposes of the forthcom-

112. See *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>; *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>.

113. See Chiesa, *supra* note 13, at 765 ("[W]hether a coerced actor voluntarily assumed duties of self-sacrifice should have a profound effect on the proportionality that society is willing to require in order for the actor to successfully plead duress.").

114. *Id.* at 772 ("While the law should not generally demand that most people resist threats to their lives in order to avoid harm to third parties, it is perfectly legitimate to require such a degree of courage from people who, like soldiers, have assumed certain duties towards to [sic] the general populace.").

115. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 80.

116. For an argument in favor of viewing this proportionality requirement as an excuse, rather than a justification, see Chiesa, *supra* note 13, at 770–71. "The fact that the coerced actor's victims would have died soon anyway is relevant to determining whether the actor's conduct generates sufficient understanding among the public to warrant an exemption from criminal liability Thus, although a coerced actor who harms an innocent victim may act wrongfully despite the fact that she could not have prevented the harm, this fact provides a sound reason to excuse her conduct. There is no need to inquire whether the harm caused was proportional to the harm averted in order to determine whether to excuse the coerced actor. Because the actor effectively lacked the capacity to prevent the harm threatened from occurring, punishing the actor for deciding to save her own life instead of dying to protect innocent people who were going to die anyway would be unfair. In sum, yielding to the coercive threats in this case is wrongful but perfectly understandable and, hence, not punishable." *Id.* (footnote omitted).

ing analyses, I will assume that an international court would require that the defendant show that the harm he caused by relenting to the duress was not disproportionate to the harm that would have occurred if he had sacrificed his own life.

The remaining significant difference between the standards set by the aforementioned international legal institutions is the "no fault" requirement imposed by both the IMT and Judge Cassese. This criterion for duress requires a defendant to show that he was not responsible for placing himself in the situation that lead to the unlawful coercion. In comparison, the Rome Statute does not include a similar requirement. However, an international criminal tribunal would likely reject a defense of duress from a defendant who joined a criminal organization willingly and then pleaded duress after he was forced to commit unlawful acts. Whether the defendant willingly participated in a criminal enterprise in which he should have reasonably expected to be required to commit unlawful acts strikes at the heart of whether the defendant had any "real moral choice" in committing the crimes.¹¹⁷ If the defendant knew or should have known that the organization he had joined was "purposefully intent upon actions contrary to international humanitarian law," then the court should not permit him to assert a defense of duress.¹¹⁸ However, if the defendant could not have reasonably known that the organization engaged in criminal activity, then the court should allow the defense of duress so long as the other requirements are satisfied.¹¹⁹

Based on previous case law, as well as the international community's adoption of the standards set for duress in the Rome Statute, the following criteria should apply to a civilian who wishes to assert an affirmative defense of duress for charges of war crimes or crimes against humanity where the civilian has killed an innocent person:

117. See KNOOPS, *supra* note 20, at 50-54 (discussing the "no fault" requirement established by Judge Cassese in *Erdemović* and emphasizing the importance of the availability of a moral choice in determining whether to assign criminal culpability to defendants).

118. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf> ("More particularly, in applying the conclusions of law which I have reached above, in my view the Trial Chamber to which the matter is remitted must first of all determine whether the situation leading to duress was voluntarily brought about by the Appellant. In particular, the Trial Chamber must satisfy itself whether the military unit to which he belonged and in which he had voluntarily enlisted . . . was purposefully intent upon actions contrary to international humanitarian law and the Appellant either knew or should have known of this when he joined the Unit or, if he only later became aware of it, that he then failed to leave the Unit or otherwise disengage himself from such actions. If the answer to this be in the affirmative, the Appellant could not plead duress. Equally, he could not raise this defence if he in any other way voluntarily placed himself in a situation he knew would entail the unlawful execution of civilians. If, on the other hand, the above question be answered in the negative, and thus the Appellant would be entitled to urge duress, and the Trial Chamber must then satisfy itself that the other strict conditions required by international criminal law to prove duress are met in the instant case")

119. See *id.*

- (1) The act charged was done under an imminent threat of death or serious bodily harm;
- (2) there was no adequate means of escaping the threat;
- (3) the crime committed was not disproportionate to the evil threatened, so that the harm caused by obeying the order did not outweigh the harm threatened against the defendant;
- (4) the defendant did not voluntarily place himself in a situation in which he would be required to perform the unlawful act; and
- (5) the defendant did not owe any special duty of care toward the victim.

B. Case Studies

The following are examples of instances when courts should have allowed civilians to raise an affirmative defense of duress to charges of war crimes and crimes against humanity that involved the killing of an innocent person. The first case study features Johann Vican, a former concentration camp prisoner and capo. Vican was tried before a U.S. military court in Dachau and found guilty of violating the laws and usages of war through wrongfully encouraging, aiding, abetting, or participating in the deaths of other prisoners.¹²⁰ He was sentenced to twenty years in prison.¹²¹ The second case study features Félix, a Rwandan man who was part of a group that beat a boy to death with clubs.¹²² After the genocide, he confessed to his involvement in the murder and was imprisoned for an unknown number of years.¹²³ The following paragraphs will now apply the standards for duress as explained above in Part III, Section A, to both of these case studies.

1. *Former Concentration Camp Capo Johann Vican*

On July 8, 1945, the American Joint Chiefs of Staff issued the “Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders” (J.S.C. 1023/10).¹²⁴ The directive called on “[a]ppropriate military courts” to conduct trials of suspected criminals in their custody.¹²⁵ These military courts received jurisdiction over crimes involving:

- a. Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare.

120. *United States v. Vican*, Case No. 000-Flossenbug-3, ¶¶ I, VI (Gen. Military Gov’t Court at Dachau, Dec. 1, 1947).

121. *See id.* ¶¶ IV, VI.

122. *See* LEE ANN FUJII, *KILLING NEIGHBORS: WEBS OF VIOLENCE IN RWANDA* 158–64 (2009).

123. *Id.* at 158–60.

124. *See* TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10* (1949), app. C (“Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders”).

125. *Id.* annex to app. A to enclosure B, art. 7.

b. Initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties.

c. Other atrocities and offenses, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.¹²⁶

J.S.C. 1023/10 also authorized personal jurisdiction over middle- and lower-level Nazi criminals, thus granting military courts jurisdiction over members of the SS who had served as camp guards and doctors, and even former prisoners who had committed crimes while serving as block leaders and capos.¹²⁷

In order to maintain order within the concentration camps, the SS appointed certain prisoners as block elders and capos.¹²⁸ These prisoners were assigned the task of keeping the other inmates under control and enforcing the rules of the camp.¹²⁹ In exchange for collaboration, the capos received additional rations and enjoyed marginally better living conditions than their fellow inmates.¹³⁰ Many prisoners accepted positions as capos as a means of surviving the harsh conditions in the camps.¹³¹ Survival became the prisoners' number one priority due to hard labor and starvation diets.¹³² As one former prisoner reflected: "How was I able to survive in Auschwitz? My principle is: I come first, second, and third. Then nothing, then again I; and then all the others."¹³³

As part of their duties, the SS required capos to beat inmates who violated a camp rule.¹³⁴ Although the SS imposed a lower limit on the severity of these beatings, they did not generally impose an upper limit.¹³⁵ Therefore, it became common for capos to use excessive force when inflicting punishments on other prisoners.¹³⁶ Whether the additional force was motivated by a fear of reprisal for administering an insufficient punishment, or by a sadistic desire to inflict suffering on others, depended entirely on the personality of the individual capo.¹³⁷ Some capos intentionally murdered other prisoners, sometimes on behalf of the SS, but

126. *Id.* art. 2.

127. Michael Bryant, *Die US-amerikanischen Militärgerichtsprozesse Gegen SS-Personal, Ärzte und Kapos des KZ Dachau 1945 - 1948*, in *DACHAUER PROZESSE: NS-VERBRECHEN VOR AMERIKANISCHEN MILITÄRGERICHTEN IN DACHAU 1945 - 1948*, 109, 109 (Ludwig Eiber & Robert Sigel eds., 2007).

128. *See, e.g., id.* at 119 (discussing the role of capos in the concentration camp system).

129. *Id.*

130. FERN OVERBEY HILTON, *THE DACHAU DEFENDANTS: LIFE STORIES FROM TESTIMONY AND DOCUMENTS OF THE WAR CRIMES PROSECUTIONS* 30-31 (2004).

131. *See id.*

132. *See* PRIMO LEVI, *THE DROWNED AND THE SAVED* 75-81 (Raymond Rosenthal trans., Vintage International 1989) (1986) (discussing the desperation felt by many concentration camp prisoners due to the conditions in the camps).

133. *Id.* at 79 (quoting Ella Lingens-Reiner in *Prisoners of Fear*).

134. *See* HILTON, *supra* note 130, at 31.

135. *See* LEVI, *supra* note 132, at 46.

136. *Id.*

137. *See* *Das KZ Dachau 1942 bis 1945: 8.4 Funktionshäftlinge, Prisoners in Special Functions*, HAUS DER BAYERISCHEN GESCHICHTE, http://www.hdbg.de/dachau/dachau_die-ausstellung_02_Abteilung-08.php (last visited Nov. 12, 2012).

often on their own initiative.¹³⁸

Despite their positions of authority over other inmates, capos were still subject to the rule of the SS guards.¹³⁹ If they failed to obey or carry out orders correctly, “regardless of whether they threatened the health or even lives of their fellow-prisoners,” capos risked receiving punishment themselves.¹⁴⁰ Some capos used their positions to help other prisoners by blackmailing SS guards or switching prisoner names on transfer lists.¹⁴¹ In performing these small acts of resistance, the capos ran the risk of discovery and punishment. “The question of whether to cooperate in the administration of the prisoner camp, which was ultimately an instrument of the SS terror, or to refuse participation, thereby relinquishing any hope of exerting influence to the benefit of the other prisoners, basically remained an irresolvable dilemma.”¹⁴²

Johann Vican was born in Czechoslovakia in 1913.¹⁴³ His family later moved to Linz, Austria, where Vican began to have minor run-ins with the law.¹⁴⁴ He was arrested thirteen times between 1930 and 1940, generally on charges of disorderly conduct or general hooliganism.¹⁴⁵ To demonstrate his opposition to the German annexation of Austria, Vican climbed a flagpole in Klein-München and tore down the Nazi flag.¹⁴⁶ Soon thereafter, the German authorities expelled him from Austria.¹⁴⁷ He was arrested again in 1940 when he re-entered Austria to visit his mother.¹⁴⁸ Vican was sent to Dachau and categorized as a criminal,¹⁴⁹ but was released in 1943 under the condition that he join the SS.¹⁵⁰ However, he refused to fulfill this promise and was subsequently arrested by the Gestapo.¹⁵¹ Returning prisoners, known within the camp as “second-timers,” were generally subjected to worse conditions and more brutal work assignments than the rest of the camp’s inmate population.¹⁵² Upon his return to Dachau, Vican suffered a beating of twenty-five lashes and was assigned to work in the stone quarry, where he was expected to be “finished off.”¹⁵³ Vican’s weight dropped to one hundred pounds, but he survived.¹⁵⁴ In October 1944, Vican was transferred to a sub-camp of Flossenbürg, where he nearly died of acidone poisoning.¹⁵⁵ After his release from the sick bay, the SS

138. *Id.*

139. *Id.*

140. *Id.*

141. See LEVI, *supra* note 132, at 45.

142. *Das KZ Dachau 1942 bis 1945: 8.4 Funktionshäftlinge*, *supra* note 137.

143. HILTON, *supra* note 130, at 28.

144. *Id.*

145. *Id.* at 29.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. STANISLAV ZÁMEČNÍK, *DAS WAR DACHAU* (2d. ed. 2010).

153. HILTON, *supra* note 130, at 29.

154. *Id.*

155. *Id.*

assigned Vican to the position of block eldest and then to capo.¹⁵⁶ He held this position from January 1945 until American forces took him prisoner in May.¹⁵⁷ Subsequently, Vican was housed with other former prisoners.¹⁵⁸ At the time, none of these prisoners attacked Vican or accused him of mistreatment.¹⁵⁹

Vican was tried at Dachau on October 2, 1947 before a Military Government Court.¹⁶⁰ He was charged with violating the laws and usages of war through wrongfully encouraging, aiding, abetting, or participating in the deaths of an unknown Russian and two unknown Polish nationals at Flossenbürg Concentration Camp.¹⁶¹ He pleaded guilty to the charges.¹⁶² The prosecution presented into evidence extrajudicial sworn statements by former prisoners who claimed that they had witnessed Vican beat his alleged victims to death.¹⁶³ Vican admitted to beating other prisoners on "about [fifty] occasions . . . for violations of camp regulations."¹⁶⁴ The defense found a witness (a former capo) who was prepared to testify that Vican "beat inmates only for the purpose of maintaining order and discipline and was not unnecessarily brutal."¹⁶⁵ Vican was sentenced to twenty years in prison.¹⁶⁶

2. Félix

Less information is known about the background and case history for the second defendant, Félix.¹⁶⁷ Dr. Lee Ann Fujii interviewed Félix while she was conducting research for a study on the various levels of civilian participation and resistance during the Rwandan genocide.¹⁶⁸ After the 1994 genocide, two different judicial systems sought to bring the perpetrators of the genocide to justice: the International Criminal Tribunal for Rwanda (ICTR) and the national courts within Rwanda.¹⁶⁹ The U.N. Security Council created the ICTR in November 1994 to try persons accused of genocide, crimes against humanity, and violations of Common

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. See *United States v. Vican*, Case No. 000-Flossenburg-3, ¶ 1 (Gen. Military Gov't Court at Dachau, Dec. 1, 1947).

161. *Id.* ¶¶ II-IV.

162. HILTON, *supra* note 130, at 30.

163. *Id.* at 29-30; *United States v. Vican*, Case No. 000-Flossenburg-3, ¶ IV.

164. *United States v. Vican*, Case No. 000-Flossenburg-3, ¶ IV.

165. *Id.*

166. *Id.* ¶¶ IV, VI.

167. Félix is a pseudonym. The defendant's real name is unknown, since he was featured as part of a research project on the perpetrators of the Rwandan genocide. See Fujii, *supra* note 122, at 16-17.

168. See generally *id.*

169. See generally ALISON DES FORGES, HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 736-61 (1999) (describing the jurisdictional reach and governing law of the ICTR and the national Rwandan courts in prosecuting perpetrators of the Rwandan genocide).

Article 3 and Protocol II of the Geneva Conventions.¹⁷⁰ The Security Council created the ICTR specifically for the prosecution of government officials who instigated and encouraged the genocide.¹⁷¹ Its jurisdiction took precedence over the national courts of U.N. member states.¹⁷²

Since the ICTR focused on the leaders of the genocide, Rwandan national courts assumed the task of prosecuting lower-level perpetrators and collaborators. In August 1996, the Rwandan National Assembly passed a law regulating prosecutions for “genocide, crimes against humanity, and other crimes committed in connection with them.”¹⁷³ The law created four categories of defendants, ranked in order of the severity of their alleged crimes. Category one included persons who had helped to plan, organize, incite, or supervise the genocide and included both national and local officials and civil leaders; category two included planners or accomplices in the murders or attacks leading to the death of the victims; category three included persons who had caused serious injury to individuals; and category four included persons who had committed property crimes.¹⁷⁴ The law offered perpetrators the chance to receive a more lenient sentence if they confessed to and apologized for their crimes.¹⁷⁵

Most of the killings that occurred in Rwanda involved a combination of military or government officials, politicians, and civilians acting as perpetrators.¹⁷⁶ The perpetrators generally travelled in groups, often recruiting new members as they made their way from house to house.¹⁷⁷ “Group activities began with conducting night patrols and manning roadblocks, then escalated” to include the theft of property, beatings, and killings.¹⁷⁸ In order to spread the genocide, organizers sent perpetrators from the areas where the killings were already underway to communities where the authorities had refused to encourage participation in the killings.¹⁷⁹ According to a Human Rights Watch Report: “[T]he military encouraged and, when faced with reluctance to act, compelled both ordinary citizens and local administrators to participate in attacks, even travelling the back roads and stopping at small marketplaces to deliver the message.”¹⁸⁰ Although many perpetrators claimed that they were forced to participate in the crimes, few took advantage of subsequent opportunities to escape.¹⁸¹

170. *Id.* at 737-38.

171. *Id.* at 738.

172. *Id.* at 740.

173. *Id.* at 749-50.

174. *Id.* at 750.

175. *Id.* at 752.

176. *See generally id.* at 9, 222-41 (describing the collaborative efforts of the administrative, political, and military structures in Rwanda to perpetrate and rapidly spread the genocide).

177. *Id.* at 9; *see also* Jane Flanagan, *We Killed Seven Children That Night*, THE TELEGRAPH (June 23, 2002, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/1398160/We-killed-seven-children-that-night.html>.

178. FUJII, *supra* note 122, at 160.

179. *See* DES FORGES, *supra* note 169, at 9.

180. *Id.* at 8.

181. *See* FUJII, *supra* note 122, at 165.

Félix was one of the accused who chose to confess to his crimes in order to receive leniency from the prosecution.¹⁸² In his interview with Dr. Fujii, he confessed to being in a group that killed a Tutsi boy.¹⁸³ On the day of the crime, Félix was out harvesting in his coffee field.¹⁸⁴ A group of three leaders of the Interahamwe (a Hutu paramilitary group) approached him and ordered him to join other Hutu community members at the roadblock.¹⁸⁵ They told him they would hurt him if he refused. Félix accompanied the men to the roadblock, where "they were killing someone in front of [his] eyes."¹⁸⁶ After the group finished beating the boy to death, the others ordered Félix to bury the body.¹⁸⁷ Félix told them that he was going to get his things, and then ran away.¹⁸⁸ In his interview with Dr. Fujii, he explained that if he had refused to go to the roadblock, the three men could have killed him.¹⁸⁹ He also told Dr. Fujii that he feared for the safety of his wife, who lay seriously ill at their home.¹⁹⁰ After fleeing the Interahamwe, Félix hid.¹⁹¹ He claimed that he never beat or killed anyone, and this act was the only crime he committed during the genocide.¹⁹²

C. Application of the Defense of Duress to the Case Study Defendants

1. *The Act Charged Was Done Under an Imminent Threat of Death or Serious Bodily Harm*

Both Vican and Félix would likely succeed in satisfying this first criterion. In Vican's case, the threat of death constantly loomed over the concentration camp prisoners. Offenses as slight as stepping on the wrong strip of grass or taking an extra piece of bread could lead to beatings, denial of meals, pole-hanging, or even death.¹⁹³ Capos were subject to the same rules as the rest of the camp, and faced similar consequences if they disobeyed an order from a camp guard or failed to perform their duties.¹⁹⁴ The threat of death or serious bodily harm was, therefore, imminent.

Félix similarly held an honest belief that he could have been killed if he failed to accompany the Interahamwe leaders to the roadblock.

182. Since Félix was tried before a national court, the international law on duress would not apply to his case. However, I am using the facts of this case to answer the hypothetical question of whether Félix should have been afforded the opportunity to enter an affirmative defense of duress if his case had come before an international court, such as the ICTR.

183. See Fujii, *supra* note 122, at 158-59.

184. *Id.* at 159.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 160.

193. *Das KZ Dachau 1942 bis 1945: 6.7 Strafen und Terror, Punishment and Terror*, HAUS DER BAYERISCHEN GESCHICHTE, http://www.hdbg.de/dachau/pdfs/06/06_07/06_07_01.pdf (last visited Nov. 12, 2012).

194. See *Das KZ Dachau 1942 bis 1945: 8.4 Funktionshäftlinge*, *supra* note 137.

Although he told Dr. Fujii that he was not aware of anyone else who had been killed for refusing to comply with the Interahamwe, he told her that he was afraid of the Interahamwe leaders.¹⁹⁵ According to Dr. Fujii, coercion to join the killing groups in Ngali, Félix's region, was "direct and immediate," and often "took the form of face-to-face recruitment and intimidation."¹⁹⁶ Another interview subject told Dr. Fujii that the leader of the Interahamwe group that had threatened Félix had also threatened the lives of other men, including their own family members, who initially refused to participate in the killings.¹⁹⁷ Given the intimidation methods the leaders of the Interahamwe used, coupled with their obvious willingness to kill innocent people, it is reasonable for a court to determine that the threat against Félix fulfilled the requirement of imminence.

2. *There Was No Adequate Means of Escaping the Threat*

Both Vican and Félix should also be able to satisfy the second requirement. As a concentration camp prisoner, Vican did not have an opportunity to escape the ever-present threat of the SS. He could not voluntarily leave the camp, and neither could he refuse to obey an order from the SS without incurring punishment. Although there are records of capos who refused to carry out orders to beat other prisoners,¹⁹⁸ Vican could argue that his fear of punishment for disobeying orders was legitimate and reasonable. Block elders and capos took a risk each time they refused to carry out an order by the SS, and although refusing to punish their fellow prisoners was certainly honorable, it was also dangerous. From the perspective of a proponent of the Excuse Theory of the duress defense, Vican should not have been expected to act as reasonable hero, but rather as reasonable man.¹⁹⁹ Therefore, if a reasonable man in his position would have felt that he would risk severe punishment or death for refusing to obey the coercive

195. Fujii, *supra* note 122, at 159.

196. *Id.* at 158.

197. *Id.* at 135 (recounting an interview with a survivor who had been friends with the leader's nephew. According to the survivor, the nephew was forcibly recruited into the killing group: "[The uncle] was the head of Pawa. He was powerful and he told [my friend] to join the Interahamwe and if he did not join them, they were going to hurt him." Dr. Fujii then asked the survivor if he believed the uncle would have, in fact, killed his nephew if he had disobeyed the order. The survivor responded in the affirmative.) (alteration in original).

198. See, e.g., the eye witness of an account of former prisoner Karel Kašák found at *Das KZ Dachau 1942 bis 1945: 8.4 Funktionshäftlinge*, *supra* note 137:

On August 4, [1943] a whipping of 16 prisoners took place on the roll call grounds. The entire camp was forced to watch. Each man received 25 blows with an ox tail from the block elder. During the procedure, the camp leader, Redwitz, was in charge. I note that the block elders of the Czech block 20, Hauff, and the block elders of the religious blocks 26 and 28, Karl Frey und [sic] Kaspar Bachl, who had his hands bandaged and pretended to be unable to give the beatings, refused to carry out the punishment. All three of them were Communists, men of true character. The block elder of the Russian block 17, Sturmman No. 17560, however, showed himself to be utterly without political character, a first class rogue and scoundrel.

199. See generally KNOOPS, *supra* note 20.

order, then a court should acknowledge that Vican had no reasonable means of escape from the duress.

Likewise, Félix did not appear to have an opportunity to escape the threat. The Interahamwe leaders approached him while he was working in a field.²⁰⁰ There were three men, so it was unlikely that he could have easily run away. According to Dr. Fujii, Félix's recruitment was common in that most other people who were coerced into joining a killing squad also felt they could not refuse to go when the "leaders or their henchmen confronted them in person."²⁰¹ A court should therefore find that it was reasonable for a person in Félix's position to believe that he had no means of escaping the threat against him.

3. *The Crime Committed Was Not Disproportionate to the Evil Threatened, so that the Harm Caused by Obeying the Order Did Not Outweigh the Harm Threatened Against the Defendant*

In order to weigh the harm caused by obeying the order against the harm threatened against the defendant, the court would engage in a balancing test. Vican was charged with beating prisoners, resulting in the death of three prisoners.²⁰² The prosecutor would likely argue that causing the death of three prisoners and beating fifty prisoners resulted in a greater harm than if Vican had accepted his fate as a regular inmate or refused to administer the unlawful punishments as a capo. Even if Vican had died, the death of one prisoner would have been less "harmful" than the death of three. Given the fungibility of the prisoner leadership within the camps, Vican could argue that if he had refused to serve as a capo, another prisoner simply would have taken his place. The SS generally required the capos to beat prisoners for infractions, and given the weakened condition of the majority of camp inmates, it was probable that these beatings would contribute to or hasten the deaths of at least a few persons. Therefore, even if Vican had refused the position of capo, the total number of prisoners who died in the camp would not have been any different.

Félix should not have any difficulty fulfilling this requirement. His participation in the death of the Tutsi boy appears to be minimal. Since various other members of the Interahamwe were present at the roadblock, it is very likely that the boy would have died regardless of whether or not Félix had agreed to accompany the other men to the roadblock.

4. *The Defendant Did Not Voluntarily Place Himself in a Situation in Which He Would be Required to Perform the Unlawful Act*

Vican may have some difficulty satisfying the fourth requirement, but should ultimately prevail. Although the SS gave many prisoners the choice of whether to accept a position as a capo, refusing this "promotion" would

200. Fujii, *supra* note 122, at 159.

201. *Id.* at 160.

202. *United States v. Vican*, Case No. 000-Flossenbug-3, ¶¶ 11 (Gen. Military Gov't Court at Dachau, Dec. 1, 1947).

have meant certain death for many prisoners. Within weeks after his return to Dachau, Vican weighed only one hundred pounds.²⁰³ From late 1944 until liberation in late April or early May 1945, conditions in Dachau, Flossenbürg, and Mauthausen, as well as their sub-camps, grew drastically dire.²⁰⁴ New transports of prisoners from the eastern camps began to arrive regularly, and there was not nearly enough food or shelter for all of the prisoners.²⁰⁵ One can question whether, under such circumstances, Vican still enjoyed any “freedom of choice” in accepting the position of capo. Both the Human Frailty Theory and the Involuntariness Theory support a finding that Vican’s decision to become a capo was more likely coerced than voluntary. The coercion was inflicted not only through daily threats of death and torture, but also through the inhumane conditions of the camp. Under extreme circumstances, Vican grasped at an opportunity to save his own life, as most people would when their survival instincts take effect. If Vican could convince the court that his choice to become a capo was a life-or-death decision, he may be successful in arguing that he did not voluntarily insert himself into a position in which he would be expected to obey unlawful orders.

In contrast, Félix should have little difficulty fulfilling this requirement. He did not voluntarily join the Interahamwe, and he fled the killing group at the first opportunity. One could argue that, if Félix wanted to avoid the risk of recruitment, he should have hid earlier or chosen not to work in the fields. However, the criminal justice system should not impose a penalty on a person for putting himself in a situation in which he *might* be recruited to perform an unlawful act if the person was performing a daily routine.

5. *The Defendant Did Not Owe Any Special Duty of Care Toward the Victim*

Both Vican and Félix should be able to easily satisfy this requirement of the duress defense. Neither man was in a position in which he assumed a special duty of care over others. Some concentration camp capos voluntarily assumed a duty of care over the other prisoners and did everything in their power to protect them. However, for reasons discussed above, it would not be reasonable for a court to apply this duty of care to all capos.

It is unknown whether Félix had a pre-existing duty of care toward the Tutsi boy who was killed; such a duty may have existed if he was related to the boy or the boy was a neighbor or family friend. However, given the lack

203. HILTON, *supra* note 130, at 29.

204. See *Das KZ Dachau 1942 bis 1945: 12.1 Auflösung des KZ-Systems, Collapse of the Concentration Camp System*, HAUS DER BAYERISCHEN GESCHICHTE, http://www.hdbg.de/dachau/pdfs/12/12_01/12_01_02.PDF (last visited Nov. 12, 2012); *Das KZ Dachau 1942 bis 1945: 12.2 Dachau in der Endphase, Dachau in the Final Stage*, HAUS DER BAYERISCHEN GESCHICHTE, http://www.hdbg.de/dachau/pdfs/12/12_02/12_02_01.PDF (last visited Nov. 12, 2012).

205. See *Das KZ Dachau 1942 bis 1945: 12.2 Dachau in der Endphase*, *supra* note 204.

of evidence indicating any connection between Félix and the boy, I will assume that no such duty of care existed.

D. Summary of the Analysis of the Case Studies

Based on the requirements for duress discussed above, and their application to the facts of each of the case studies, it appears that both Vican and Félix would have a good chance of succeeding in raising affirmative defenses of duress for their crimes. Since neither was in a leadership position over other perpetrators, none of the policy arguments of the plurality in *Erdemović* should apply to their situations. Even if the defense of duress had been unavailable to either of these men, it is unlikely that it would have been sufficient to deter them from resisting the duress in the moment in which it occurred. Although there should be "legal limits as to the conduct of combatants and their commanders in armed conflict,"²⁰⁶ these same legal limits should not apply to civilians who are coerced by military personnel or other civilians to engage in unlawful conduct. Imposing such a limit on the use of the defense would impose on civilians a higher duty of care, similar to that held by soldiers. The imposition of such a duty would run contrary to the rationale behind the defense of duress, which sets expectations for the "reasonable man," rather than for the "reasonable hero."²⁰⁷

Conclusion

An international tribunal should permit a civilian to raise an affirmative defense of duress for war crimes or crimes against humanity involving the killing of an innocent person. Although a court has yet to rule on the applicability of this defense to civilians who have committed murder, based on prior precedents set by the IMT, the ICTY, and the Rome Statute, an international court is likely to permit the defense. The majority of the policy concerns raised by the plurality in *Erdemović* would not apply to a civilian defendant. Civilians would not face a higher duty of care, as soldiers do, and the international court would not need to concern itself with setting guidelines for military combatants and commanders during times of war. In keeping with the precedent set by most international institutions, civilians would only be able to successfully raise a defense of duress if they could show that the harm caused by their acquiescence to the threat did not outweigh the harm that would have been caused if they had sacrificed their own lives. As illustrated by the two case studies above, allowing civilians to assert a defense of duress would prevent the imposition of criminal liability on persons who became the victim of unfortunate circumstances during times of war.

206. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 80 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>.

207. See Chiesa, *supra* note 13, at 757.